

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



October 17, 2002

Agenda ID #1269

TO: PARTIES OF RECORD IN APPLICATION 00-10-012 ET AL.

This is the draft decision of Administrative Law Judge (ALJ) Rosenthal. It will not be on the Commission's agenda before November 4, 2002. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Rule 77.7(f)(9) provides for reduction or waiver of the 30-day comment period on draft decisions and alternates when public necessity requires such reduction. We reduce the comment period to 20 days. Comments are due on November 4, 2002. No reply comments are allowed. An original and four copies of the comments with a certificate of service shall be filed with the Commission's Docket Office and copies shall be served on all parties on the same day of filing. The Commissioners and ALJ shall be served separately by overnight service.

/s/ CAROL BROWN by KH
Carol Brown, Interim Chief
Administrative Law Judge

CAB:sid

Attachment

Decision **DRAFT DECISION OF ALJ ROSENTHAL** (Mailed 10/17/2002)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the Application of the Los Angeles to Pasadena Metro Blue Line Construction Authority for an order Authorizing the construction of two light Rail transit tracks at-grade crossing West Avenue 45 in the City and County of Los Angeles, California.

Application 00-10-012
(Filed October 11, 2000)

And Related Matters.

Application 01-06-011
Application 00-11-050
Application 00-11-040
Application 00-11-034
Application 00-11-033
Application 00-11-032
Application 00-11-029
Application 00-11-016
Application 00-11-015
Application 00-10-050
Application 00-10-039
Application 00-10-033
Application 00-10-020

ORDER DENYING PETITION FOR MODIFICATION

Summary

The petition of Pasadena Avenue Monterey Road Committee (PAMRC) to modify Decision (D.) 02-05-047 to approve a dual crossing at Pasadena Ave. is denied.

Background

On August 23, 2002, Petitioner PAMRC filed a petition for modification of D.02-05-047. This May 16, 2002 decision granted permission to Los Angeles to Pasadena Metro Blue Line Construction Authority (Blue Line) to construct various grade crossings along the route of its proposed light rail facility. The subject of the petition is the single at-grade crossing of Pasadena Ave. in the City of South Pasadena. Accompanying the petition are approximately 2,000 signatures as well as letters, signed by the State Senator and Assemblyperson in whose district the subject crossing lies, urging the Commission to reconsider its decision.

On August 30, 2001, Blue Line filed a motion requesting that the time for responding to the petition be shortened to 14 calendar days or September 14, 2002. Blue Line did not file its response until September 18, 2002. The requested relief is moot and, therefore, denied.

Request of Petitioner

Among other relief,¹ the petition requests that D.02-05-047 be modified to approve a dual crossing for Pasadena Ave. The original application of Blue Line proposed separate at-grade crossings at Pasadena Ave. East and Pasadena Ave. West. PAMRC states that this configuration has been the subject of community meetings and was approved by the general public and the City of South Pasadena. The dual-crossing of Pasadena Ave. was opposed by the Commission's Rail Crossing Engineering Section of the Rail Safety and Carriers

¹ The petition also requests that D.02-05-047 be modified to require ingress and egress to Railroad Alley from Monterey Road or Pasadena and four quadrant gates at the East Crossing and pedestrian gates at the West Crossing.

Division (Staff), which asserted the proposed at-grade crossings would be unsafe and urged construction of a grade separation instead. Protestant Jo Anne Barker also opposed it. Barker eventually withdrew from the proceeding

Staff and Blue Line thereafter reached an agreement for a reconfigured single at-grade crossing at Pasadena Ave. This was announced in open hearing on December 12, 2001. (Tr. 1729.) Blue Line withdrew the dual-crossing proposal from its application and substituted the single crossing plan. (Tr. 1827.) Thus, the dual-crossing concept was no longer before the Commission.

The ALJ Proposed Decision and an Alternate Proposed Decision of Commissioner Duque were mailed to the parties on April 16, 2002. Both decisions accepted the one-crossing solution for Pasadena Ave. The Proposed Decision of Commissioner Duque was ultimately adopted by the Commission as D.02-05-047.

Discussion

PAMRC's allegations can be summarized as follows:

1. Insufficient evidence of the safety of the revised proposal.
2. Lack of notice to the public, thereby preventing input from the public.
3. Lack of environmental compliance for the revised crossing proposal.
4. Vacation of public streets without following the proper procedure.

As an initial matter, the petition raises procedural concerns. Rule 47(a) of the Commission's Rules of Practice and Procedure governs our review of a petition to modify and sets forth the limited scope of relief available: "A petition

for modification asks the Commission to make changes to the text of the issued decision.” Here, PAMRC seeks redress of legal errors. As we stated in D.98-12-091, “a Commission order may be challenged for legal error only by the rehearing process initiated by an application for rehearing filed within 30 days of the issuance of the challenged decision.” Rule 85 expressly requires that the rehearing application be filed within 30 days of the date of issuance, that is the mailing date. The time for that has long since passed. The petition was filed on August 23, 2002, more than 90 days after the mailing of D.02-05-047.

Second, PAMRC has not been granted party status in this proceeding. In an application proceeding such as this one, an entity may be given party status upon the filing of a pleading early in the proceeding, e.g., a protest or response, or by filing a motion to intervene. Rule 54 provides that:

“an appearance may be entered at the hearing without filing a pleading, if an affirmative relief is sought, if there is full disclosure of the persons or entities on whose behalf the appearance is being entered, if the interest of such persons or entities in the proceeding and the position intended to be take are stated fairly, and if the contentions will be reasonably pertinent to the issues already presented and any right to broaden them is duly disclaimed.”

PAMRC did not file a protest or response in this proceeding. Neither did PAMRC file a petition to intervene.

Despite these procedural concerns, we shall nonetheless address the allegations raised by PAMRC. We recognize the public interest surrounding construction of the project and wish to avoid generating further controversy.

A. Insufficient Evidence of Safety

A review of the evidence indicates that the record supports our decision. Blue Line sponsored a diagram of the revised crossing proposal.

(Exh. 55.) Witness Stone testified in support of the revision (Tr. 1734-43; 1822-23), including its enhanced safety over the dual crossing proposal.

“So it is clearly better from a safety perspective in my opinion to be able to consolidate all of the movements into one crossing rather than two back-to-back skewed crossings.” (Tr. 1822.)

For this reason, we find that PAMRC’s allegation is without merit.

B. Lack of Notice

Blue Line gave notice of its amended proposal for a single crossing in an open hearing on December 12, 2001. In addition, both the proposed decision of the ALJ and alternate decision of Commissioner Duque gave notice of the single crossing proposal. PAMRC’s allegation of a lack of notice is, therefore, unwarranted. PAMRC did not avail itself of the opportunity to file comments on the proposed decision of the ALJ or Commissioner Duque. In fact, we have no record of any communication to the ALJ or the Commission by PAMRC between December 12, 2001 and August 23, 2002.

C. Lack of Environmental Compliance

As the Commission noted in D.02-10-023, environmental issues have addressed repeatedly and extensively in the course of this proceeding. D.02-01-035 found that the environmental effects associated with all of the grade crossings were analyzed in the environmental documents for this project.

Whether the change in the proposed crossing presents environmental problems is a matter that should have been brought to the lead agency. The “lead agency” for this project is BLA, successor in interest to MTA and LACTC. The Commission is a “responsible agency” and is required to consider the environmental documents prepared by the lead agency before granting authority

to construct. D.02-05-047 held that any challenges to the adequacy of the environmental documents should have been raised when the lead agency considered and certified those documents and not at this late stage. With limited exceptions, a final EIR is conclusively presumed to be valid and binding on a responsible agency unless a timely challenge is filed pursuant to Public Resources Code Section 21167.

D. Improper Vacation of Public Streets

PAMRC points to various provisions of the Government Code and Streets and Highway Code and asserts that our decision violates the procedures required to vacate streets. Suffice it to say that this Commission is granted exclusive power to determine construction or closing of a crossing. (Public Utilities Code Section 1202(b).) We made no determination over streets other than within our crossing jurisdiction.

Reduction of Comment Period

The 30-day comment period otherwise required by Public Utilities Code Section 311(g)(1) may be shortened for an unforeseen emergency situation, pursuant to Section 311(g)(2). Rule 81 of our Rules of Practice and Procedure (Rules) defines “unforeseen emergency situation” to include “...extraordinary conditions in which time is of the essence.” (Rule 81(f).) Rule 77.7(f)(9) refers to situations where “... public necessity requires reduction or waiver of the 30-day period for public review and comment.”

We find there to be an unforeseen emergency situation and a public necessity in the instant matter. Blue Line states that deferred action on the petition could be “very serious, causing substantial delays in project completion and massive cost overruns that would threaten its financial integrity and ability to complete the project.” (Blue Line Motion, p. 3.) Blue Line has laid track and

plans to complete construction as well as testing of the subject crossing by November, 2002. Blue Line adds that it will incur substantial penalties if it is required to delay its contractor.

The unexpected filing of a petition to modify our decision by a non-party under the circumstances outlined above creates an unforeseen emergency situation and the public necessity-requiring reducing the 30-day comment period to 20 days. Comments must be filed and served by November 4, 2002. There will be no reply comments.

Assignment of Proceeding

Commissioner Henry Duque is the Assigned Commissioner and Sheldon Rosenthal is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. There is evidence of safety for the one-crossing determination for Pasadena Ave.
2. The changed proposed for Pasadena Ave. was made in open hearings.
3. PAMRC could have sought intervention to participate in the public hearings, briefing, or to file comments to the proposed or alternate decisions.
4. PAMRC did not file a protest or a response in this proceeding. Neither did it file a motion to intervene.
5. PAMRC did not make its environmental position known to the Commission until seven months after Blue Line revised its application and three months after the Commission's decision.
6. The Commission's decision does not address street alterations beyond crossings.
7. Dual crossings of Pasadena Ave. were no longer a part of Applicant's proposal.

8. Blue Line has laid track and plans to complete construction as well as testing of the subject crossing by November, 2002. Blue Line will incur substantial penalties if it is required to delay its contractor.

Conclusions of Law

1. The petition is an untimely application for rehearing.
2. PAMRC is not a party to this proceeding.
3. PAMRC has not presented sufficient justification to cause us to modify D.02-05-047.
4. The unexpected filing of a petition to modify by a non-party creates an unforeseen emergency situation and the public necessity-requiring reducing the 30-day comment period to 20 days.

Therefore, **IT IS ORDERED** that Pasadena Avenue Monterey Road Committee's petition for modification of Decision 02-05-047 is denied.

This order is effective today.

Dated _____, at San Francisco, California.